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I. Real Party in Interest

The real party in interest is L'Oréal S.A., the assignee of the entire right, title, and interest in the application, as indicated by assignment duly recorded in the U.S. Patent and Trademark Office ("USPTO") at Real 011677, Frame 0567, on April 6, 2001.

II. Related Appeals and Interferences

In U.S. Application No. 09/725,049 (attorney docket No. 05725.0784-00000), which is now abandoned, an Appeal Brief was filed on August 15, 2005, and the Examiner subsequently re-opened prosecution prior to any decision by the Board. The Appeal Brief filed in U.S. Application No. 09/725,049 may be related to, directly affect, be directly affected by, or have a bearing on the Board's decision in the pending appeal, and a copy of that Appeal Brief has been submitted herewith.

Appellant, Appellant's legal representatives, and assignee are aware of no other appeals, interferences, or judicial proceedings that may be related to, directly affect, be directly affected by, or have a bearing on the Board's decision in this appeal.

III. Status of Claims

Claims 1-3, 21-23, 49-58, 60, and 63 have been previously canceled without prejudice or disclaimer. Claims 4-20, 24-48, 59, 61 and 62 are pending in this application, of which claims 5, 9, 10, 12-20, and 24 have been withdrawn from consideration. Claims 4, 6-8, 11, 25-48, 59, 61, and 62,¹ as set forth in the Claims Appendix, have been rejected in the Office Action dated August 7, 2007, and the rejections applied to those claims are at issue in this appeal.

¹ In separate claim rejections under 35 U.S.C. § 112, first paragraph, and § 112, second paragraph, the Examiner listed claim 60 as being rejected. Appellants respectfully note that claim 60 is no longer present in the application. Thus, Appellants have not listed the status of claim 60 as being rejected and have not listed claim 60 in the comments outlining why the claim rejections under §112, first and second paragraphs, are improper and should be reversed.

IV. Status of Amendments

No amendments under 37 C.F.R. § 1.116 have been filed subsequent or in response to the Office Action of August 7, 2007.

V. Summary of Claimed Subject Matter

A. Independent Claim 4

The subject matter set forth in independent claim 4 relates to a process for acquiring scanned image data relating to an external body portion and/or a product applied to the external body portion. (P. 4, ll. 3-5.)² The process comprises placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member. (P. 4, ll. 5-6; Figs. 3, 4, and 7.) The transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another. (P. 5, ll. 1-14; Fig. 4.) The transfer image is not a fingerprint or fingerprints, and the external portion that the transfer member is placed in contact with does not include a tooth or teeth. (P. 4, ll. 10-17; p. 8, ll. 1-10; Figs. 3, 4, and 7.) The process further comprises scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of the external body portion, and/or at least one product applied to the external body portion. (P. 4, ll. 7-9; Figs. 5-7.) In the process of claim 4, the transfer member is placed in direct contact with an external body portion including a cosmetic product applied thereto, and the image of the scanned image data is representative of at least one characteristic of the cosmetic product. (P. 5, l. 10 - p. 6, l. 4; p. 17, l. 19 - p. 18, l. 19; Fig. 7.)

² The references to the specification and drawings in this Appeal Brief are merely intended to facilitate explaining how the originally-filed application provides exemplary embodiments and exemplary disclosure relating to the claimed subject matter. Those references should not be construed as limiting the claims.

B. Dependent Claim 6

Dependent claim 6 depends from independent claim 4, and the subject matter set forth in dependent claim 6 relates to the external portion including skin, and the cosmetic product being foundation makeup. (P. 5, ll. 21-23; Fig. 3.)

C. Dependent Claim 7

Dependent claim 7 depends from dependent claim 6, and the subject matter set forth in dependent claim 7 relates to the transfer member being formed of fabric. (P. 6, ll. 1-4; p. 18, ll. 12-19; Fig. 4.)

D. Dependent Claim 8

Dependent claim 8 depends from dependent claim 7, and the subject matter set forth in dependent claim 8 relates to the transfer member being an article of clothing. (P. 6, ll. 1-4; p. 18, ll. 12-19; Fig. 4.)

E. Independent Claim 11

The subject matter set forth in independent claim 11 relates to a process for acquiring scanned image data relating to an external body portion and/or product applied to the external body portion. (P. 4, ll. 3-5.) The process comprises placing a transfer member in contact with an external portion of an individual as to obtain a transfer image on the transfer member. (P. 4, ll. 5-6; Figs. 3, 4, and 7.) The transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another. (P. 5, ll. 1-14; Fig. 4.) The transfer image is not a fingerprint or fingerprints, and the external portion that the transfer member is placed in contact with does not include a tooth or teeth. (P. 4, ll. 10-17; p. 8, ll. 1-10;

Figs. 3, 4, and 7.) The process further comprises scanning the transfer image with a optical image scanner to obtain scanned image data for an image representative of at least one characteristic of the external body portion, and/or at least one product applied to the external body portion. (P. 4, ll. 7-9; Figs. 5-7.) In the process of claim 11, the transfer member is moldable material, and the process includes placing the moldable material in direct contact with the skin of the individual to produce, on the moldable material, the surface profile of the skin. (P. 6, ll. 5-7; p. 18, l. 20 - p. 19, l. 2.)

F. Independent Claim 25

The subject matter set forth in claim 25 relates to a process for acquiring scanned image data relating to an external body portion and/or a product applied to the external body portion. (P. 4, ll. 3-5.) The process comprises placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member. (P. 4, ll. 5-6; Figs. 3, 4, and 7.) The transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another. (P. 5, ll. 1-14; Fig. 4.) The transfer image is not a fingerprint or fingerprints, and the external portion that the transfer member is placed in contact with does not include a tooth or teeth. (P. 4, ll. 10-17; p. 8, ll. 1-10; Figs. 3, 4, and 7.) The process further comprises scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of the external body portion, and/or at least one product applied to the external body portion. (P. 4, ll. 7-9; Figs. 5-7.) In the process of claim 25, the image scanner is associated with a first computer located at a first location, and the process further comprises transferring the scanned image data from the first computer to a

second computer located at a second location remote from the first location. (P. 7, ll. 8-13; Fig. 1.) In addition, the image scanner is configured in the form of a scanner for scanning documents. (P. 14, ll. 19-21; Fig. 5.)

G. Independent Claim 37

The subject matter set forth in claim 37 relates to a process of analyzing at least one characteristic of an external body portion of an individual and/or at least one product applied to the external body portion. (P. 7, ll. 18-19.) The process comprises acquiring scanned image data. The acquiring comprises placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member (p. 4, ll. 5-6; Figs. 3, 4, and 7), wherein the transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another (p. 5, ll. 1-14; Fig. 4), and wherein the transfer image is not a fingerprint or fingerprints, and the external portion that the transfer member is placed in contact with does not include a tooth or teeth (p. 4, ll. 10-17; p. 8, ll. 1-10; Figs. 3, 4, and 7); and scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of the external body portion, and/or at least one product applied to the external body portion (p. 4, ll. 7-9; Figs. 5-7). The process of claim 37 further includes displaying an image corresponding to the scanned image data, viewing the displayed image to analyze the at least one characteristic, and comparing the displayed image to at least one image formed from image data stored in an image database. (P. 7, ll. 19-21; p. 10, ll. 4-6.)

H. Independent Claim 38

The subject matter set forth in claim 38 relates to a process for recommending treatment for an external body portion. (P. 9, ll. 6-7.) The process comprises analyzing at least one characteristic of an external body portion, wherein the analyzing comprises acquiring scanned image data, displaying an image corresponding to the scanned image data, and viewing the displayed image to analyze the at least one characteristic. (P. 7, ll. 19-21.) The acquiring comprises placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member (p. 4, ll. 5-6; Figs. 3, 4, and 7), wherein the transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another (p. 5, ll. 1-14; Fig. 4), and wherein the transfer image is not a fingerprint or fingerprints, and the external portion that the transfer member is placed in contact with does not include a tooth or teeth (p. 4, ll. 10-17; p. 8, ll. 1-10; Figs. 3, 4, and 7); and scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of the external body portion, and/or at least one product applied to the external body portion (p. 4, ll. 7-9; Figs. 5-7). The process of claim 38 further comprises determining a recommendation of at least one treatment for the external portion, and providing the treatment recommendation so that the external portion of the individual may be treated according to the recommendation. (P. 9, ll. 6-19.) In addition, claim 38 recites that the image scanner is configured in the form of a scanner for scanning documents. (P. 14, ll. 19-21.)

I. Independent Claim 46

The subject matter set forth in claim 46 relates to a process of evaluating a product applied to an external body portion. (P. 9, ll. 20-22.) The process comprises analyzing at least one characteristic of a product applied to an external body portion. (P. 8, ll. 11-19.) The analyzing comprises acquiring scanned image data, displaying an image corresponding to the scanned image data, and viewing the displayed image to analyze at least one characteristic. (P. 7, ll. 18-21.) Acquiring scanned image data comprises placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member. (P. 4, ll. 5-6; Figs. 3, 4, and 7.) The transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another. (P. 5, ll. 1-14; Fig. 4.) The transfer image is not a fingerprint or fingerprints, and the external portion that the transfer member is placed in contact with does not include a tooth or teeth. (P. 4, ll. 10-17; p. 8, ll. 1-10; Figs. 3, 4, and 7.) Acquiring scanned image data further comprises scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of the external body portion, and/or at least one product applied to the external body portion. (P. 4, ll. 7-9; Figs. 5-7.)

J. Dependent Claim 47

Dependent claim 47 depends from independent claim 46, and the subject matter set forth in dependent claim 47 relates to the transfer member being placed in contact with an external body portion including a cosmetic product applied thereto, and the scanned image data being representative of at least one characteristic of the cosmetic product. (P. 5, l. 10 - p. 6, l. 4; p. 17, l. 19 - p. 18, l. 19; Fig. 7.)

K. Independent Claim 48

The subject matter set forth in claim 48 relates to a process for acquiring scanned image data relating to an external body portion and/or a product applied to the external body portion. (P. 4, ll. 3-5.) The process comprises placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member. (P. 4, ll. 5-6; Figs. 3, 4, and 7.) The transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another. (P. 5, ll. 1-14; Fig. 4.) The transfer image is not a fingerprint or fingerprints, and the external portion that the transfer member is placed in contact with does not include a tooth or teeth. (P. 4, ll. 10-17; p. 8, ll. 1-10; Figs. 3, 4, and 7.) The process further comprises scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of the external body portion, and/or at least one product applied to the external body portion. (P. 4, ll. 7-9; Figs. 5-7.) As set forth in claim 48, the process further comprises collecting information relating to the transfer image of the transfer member to form a database for use in at least one of diagnoses, treatment recommendation determinations, product evaluations, and product formulations. (P. 10, ll. 1-4.)

L. Independent Claim 59

The subject matter set forth in claim 59 relates to a process for acquiring scanned image data relating to an external body portion and/or a product applied to the external body portion. (P. 4, ll. 3-5.) The process comprises placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on

the transfer member. (P. 4, ll. 5-6; Figs. 3, 4, and 7.) The transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another. (P. 5, ll. 1-14; Fig. 4.) The transfer image is not a fingerprint or fingerprints, and the external portion that the transfer member is placed in contact with does not include a tooth or teeth. (P. 4, ll. 10-17; p. 8, ll. 1-10; Figs. 3, 4, and 7.) The process further comprises scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of the external body portion, and/or at least one product applied to the external body portion. (P. 4, ll. 7-9; Figs. 5-7.) As set forth in claim 59, the process further comprises analyzing the external body portion and/or the transfer member with analysis equipment chosen from one of a corneometer, a dermal torque meter, a pH meter, and a device for measuring hydration of the skin. (P. 25, ll. 5-9.)

VI. Grounds of Rejection to be Reviewed on Appeal

Claims 4, 6, 7, 11, 25-48, 59, 61, and 62 stand rejected under 35 U.S.C. §112, first paragraph. Office Action at 2.

Claims 4, 6, 7, 11, 25-48, 59, 61, and 62 stand rejected under 35 U.S.C. §112, second paragraph. Id. at 3.

Claims 4, 6, 37, 46-48, 59, 61, and 62 stand rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent Number 5,343,536 to Groh ("Groh"). Id. at 5.³

Claims 4, 7, 8, and 11 stand rejected under 35 U.S.C. §102(e) as being anticipated by U.S. Patent Number 6,533,971 to Stess et al. ("Stess"). Id. at 7.

Claims 25-36 and 38-45 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Groh in view of Kvedar et al., "Teledermatology in a Capitated Delivery System Using Distributed Information Architecture: Design and Development" ("Kvedar"). Id. at 9.

³ Appellants respectfully submit that in the Office Action of August 7, 2007, the Examiner improperly failed to respond to Appellants' written remarks included in the Appeal Brief filed April 27, 2007, outlining numerous reasons why the claim rejections under 35 U.S.C. §102(b), § 102(e), and § 103(a) included in the final Office Action of October 13, 2006 are improper. The same claim rejections are included in the Office Action of August 7, 2007, and those rejections are at issue again in this appeal. According to M.P.E.P. § 707(f), an Examiner must provide clear explanations of all actions taken by the Examiner during prosecution of an application. Moreover, "[w]here the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it." Id. In the Office Action of August 7, 2007, rather than either responding to written comments included in the Appeal Brief filed April 27, 2007, or withdrawing the claim rejections under §§ 102(b), 102(e), and 103(a), the Examiner merely asserts that those written comments "have been considered but are moot in view of the new ground(s) of rejection." Office Action at 11. Appellants respectfully note that the "new ground(s) of rejection" are limited to new rejections under 35 U.S.C. § 112, first and second paragraphs. The claim rejections under §§ 102(b), 102(e), and 103(a) are the same as those included in the final Office Action issued October 13, 2006, and the Examiner has not set forth any new interpretations of the references relied in those claim rejections. Nor has the Examiner provided any comments in response to the arguments set forth in the Appeal Brief filed April 27, 2007. Under these circumstances, Appellants respectfully submit that the Examiner's failure to respond to Appellants' written remarks is improper, and Appellants respectfully request that if the Examiner refuses to withdraw the claim rejections under §§ 102(b), 102(e), and/or 103(a) in response to this Appeal Brief, that the Examiner provide rationale in purported support of such rejections, so Appellants are provided with a fair opportunity to respond appropriately.

VII. Argument

Summary of Argument

The rejection of claims 4, 6, 7, 11, 25-48, 59, 61, and 62 under 35 U.S.C. §112, first paragraph, should be reversed because a person skilled in the art would clearly understand that Appellants were in possession of the subject matter recited in the amendments to independent claims 4, 11, 25, 37, 38, 46, and 59, as of the filing date of the application.

The rejection of claims 4, 6, 7, 11, 25-48, 59, 61, and 62 under 35 U.S.C. § 112, second paragraph, should be reversed because claims covering more than one disclosed embodiment are not necessarily improper under § 112, second paragraph.

The rejection of claims 4, 6, 37, 46-48, 59, 61, and 62 under 35 U.S.C. § 102(b) based on Groh should be reversed because Groh fails to disclose all of the features recited in those claims.

The rejection of claims 4, 7, 8, and 11 under 35 U.S.C. § 102(e) based on Stess should be reversed because Stess fails to disclose all of the features recited in those claims.

The rejection of claims 25-36 and 38-45 under 35 U.S.C. § 103(a) based on Groh in combination with Kvedar should be reversed because the Examiner has failed to set forth a *prima facie* case of obviousness.

A. Rejection of claims 4, 6, 7, 11, 25-48, 59, 61, and 62 under 35 U.S.C. §112, first paragraph, should be reversed because a person skilled in the art would clearly understand that Appellants were in possession of the subject matter recited in the amendment to independent claims 4, 11, 25, 37, 38, 46, and 59 as of the filing date of the application

In the Office Action dated August 7, 2007 ("Office Action"), the Examiner rejected claims 4, 6, 7, 11, 25-48, 59, 61, and 62 under 35 U.S.C. § 112, first paragraph, because subject matter included in the amendments to claims 4, 11, 25, 37, 38, 46, 48, and 59 included in the Amendment filed April 28, 2004, is allegedly not supported by the originally-filed application. Office Action at 2. In particular, the Examiner alleges that "the originally-filed disclosure does not provide evidence that Applicant possessed [the claim limitations 'not a fingerprint or fingerprints' and 'does not include a tooth or teeth'] at the time the application was filed." Id. Appellants respectfully requests reversal of the claim rejection under § 112, first paragraph, at least because the originally-filed application clearly supports the subject matter included in the amendments to claims 4, 11, 25, 37, 38, 46, 48, and 59, as will be outlined below.

Appellants respectfully submit that the recitation that a "transfer image is not a fingerprint or fingerprints," and the recitation that an "external portion that that [a] transfer member is placed in contact with does not include a tooth or teeth" are supported by the originally-filed application in accordance with 35 U.S.C. § 112, first paragraph. According to The Manual of Patent Examining Procedure (8th ed. rev. 6 Sept. 2007) ("M.P.E.P."), "[a]ny negative limitation or exclusionary proviso must have basis in the original disclosure[, but i]f alternative elements are positively recited in the

specification, they may be explicitly excluded in the claims.” § 2173.05(i) (citing In re Johnson, 558 F.2d 1008, 1019, 194 U.S.P.Q. 187, 196 (CCPA 1977)).

Appellants respectfully submit that “fingerprints” and “teeth” are positively recited in the originally-filed application, and thus, the negative recitation relating to those elements is proper under 35 U.S.C. § 112, first and second paragraphs. For example, at page 4, line 13, of the originally-filed application, the description positively recites “teeth.” Moreover, teeth and nondermatoglyphic features, which include the *lack* of a fingerprint and/or fingerprints, are recited at page 8, lines 1-10 of the originally-filed description. (Appellants also respectfully note that in a Reply to Office Action filed December 5, 2005, Appellants traversed a claim rejection under 35 U.S.C. § 112, first paragraph, that relied on a flawed rationale at least similar to the flawed rationale included in the Office Action issued August 7, 2007, and the Examiner withdrew the claim rejection in the next Office Action.)

For at least these reasons, the originally-filed application supports the negative limitations relating to fingerprint(s) and teeth added to the claims in the Amendment filed April 28, 2004. Therefore, the rejection of claims 4, 6, 7, 11, 25-48, 59, 61, and 62 under 35 U.S.C. § 112, first paragraph, is improper and should be reversed.

B. Rejection of claims 4, 6, 7, 11, 25-48, 59, 61, and 62 under 35 U.S.C. § 112, second paragraph, should be reversed because claims covering more than one disclosed embodiment are not necessarily improper under § 112, second paragraph

In the Office Action, the Examiner rejected claims 4, 6, 7, 11, 25-48, 59, 61, and 62 under 35 U.S.C. §112, second paragraph, “as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as

the invention.” Office Action at 3. In particular, the Examiner asserts that “Applicant appears to be claiming multiple embodiments with in [sic] one claim,” and requests that “Applicant carefully review each of the claims to ensure that only one disclosed embodiment is recited.” Id. at 3-4. The Examiner apparently believes that independent claim 4 is indefinite because “Claim 4 recites a transfer member wherein the transfer member is applied to an external body portion and then later recites a transfer member (assumed to be same transfer member) is applied to an external body portion having a cosmetic product applied thereto.” Id. at 3-4.

Appellants respectfully submit that (1) it is not necessarily improper under 35 U.S.C. § 112, second paragraph, for a claim to encompass to more than one embodiment, and (2) the scope and meaning of independent claim 4 is clear to a person having ordinary skill in the art. Concerning claim breadth, Appellants respectfully submit that according to the M.P.E.P., “[b]readth of a claim is not to be equated with indefiniteness.” § 2173.04 (citing In re Miller, 441 F.2d 689, 169 U.S.P.Q. 597 (CCPA 1971)). Indeed, an example of a claim that encompasses the subject matter of more than one disclosed embodiment is commonly referred to as a “generic claim.” See, e.g., M.P.E.P. § 806.04(d) (providing a definition of “generic claim”). Thus, simply because a claim is broad enough to cover more than one embodiment, does not necessarily result in that claim being improper under 35 U.S.C. § 112, second, as apparently alleged by the Examiner.

Concerning the Examiner’s uncertainty regarding the recitation in claim 4 of “placing a transfer member in contact with an external portion of an individual” (line 3), and “wherein the transfer member is placed in direct contact with an external body

portion including a cosmetic product applied thereto" (lines 14-15), Appellant respectfully submits that there is nothing necessarily indefinite about this combination of recitations. The first recitation merely sets forth placing a transfer member in contact with an external portion of an individual, and the second recitation merely further defines the nature of the external body portion with which the transfer member is being placed in contact (i.e., "an external body portion including a cosmetic product applied thereto"). Thus, Appellant respectfully submits that a person having ordinary skill in the art would understand the scope and meaning of claim 4. To the extent that these comments apply to claims 6, 7, 11, 25-48, 59, 61, and 62, a person having ordinary skill in the art would understand the scope and meaning those claims for at least the same reasons.

For at least the above-outlined reasons, the rejection of claims 4, 6, 7, 11, 25-48, 59, 61, and 62 under 35 U.S.C. § 112, second paragraph, is improper. Therefore, Appellants respectfully request reversal of this claim rejection.

C. Rejection of claims 4, 6, 37, 46-48, 59, 61, and 62 under 35 U.S.C. § 102(b) based on Groh should be reversed because Groh fails to disclose all of the features recited in the claims

1. Groh does not disclose placing a transfer member in contact with an external body portion including a cosmetic applied thereto, as recited in claim 4

Appellants respectfully submit that the Section 102(b) rejection of independent claim 4 and dependent claim 6 should be reversed because Groh does not disclose "placing a transfer member in contact with an external body portion . . . including a cosmetic product applied thereto," as recited in claim 4. In the Office Action at page 6, the Examiner apparently equates a microscopic slide 11 of Groh with the recited transfer member, and the Examiner alleges that "the [purported] transfer member is

placed in contact with an external body portion that is *inherently capable* of including a cosmetic product applied thereto.” (Emphasis added). Contrary to the Examiner’s allegation, however, Groh does not disclose placing a transfer member in contact with an external body portion having a cosmetic product applied thereto and, thus, nothing in Groh supports the Examiner’s inherency allegation. Moreover, the rejection is flawed even further because it does not satisfy the requirements for a proper inherency-based rejection, as dictated by legal precedent.

“To establish inherency, the extrinsic evidence ‘must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.’”

M.P.E.P. § 2112(IV) (quoting In re Robertson, 169 F.3d 743, 745, 49 U.S.P.Q.2d 1949, 1950-51 (Fed. Cir. 1999)).

The Examiner has failed to satisfy the burden of establishing inherency because Groh does not necessarily disclose a “transfer member [that] is placed in direct contact with an external body portion including a cosmetic product applied thereto,” as recited in independent claim 4. Indeed, the Examiner has merely alleged that a purported external body portion of Groh would be “*capable*” of including a cosmetic product applied thereto. Office Action at p. 6. Such a mere allegation of capability clearly fails to satisfy the Examiner’s evidentiary burden required for the inherency-based claim rejection. See, e.g., M.P.E.P. § 2112(IV) (“The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that

result or characteristic.”). Accordingly, independent claim 4 and claim 6, which depends therefrom, are patentably distinguishable from Groh.

2. Groh does not disclose image data for an image representative of at least one characteristic of a cosmetic product, as recited in claim 4

The Section 102(b) rejection of claims 4 and 6 also should be reversed because Groh does not disclose “scanning . . . to obtain scanned image data for an image . . . representative of at least one characteristic of the cosmetic product [applied to the external body portion],” as recited in claim 4. With respect to this claim recitation, the Examiner merely alleges that “[a]ny facial cosmetic worn by the patient (i.e., moisturizer, foundation makeup, etc) would *inherently* be captured with the comedones when the transfer member is placed in contact with the external portion, and such cosmetic would be part of the scanned image data.” Office Action at p. 6 (emphasis added). Here again, nothing supports the Examiner’s inherency allegation or the inherency-based rejection.

Appellants respectfully submit that the Examiner has failed again to satisfy the burden of establishing inherency because Groh does not necessarily disclose “scanning . . . to obtain scanned image data for an image . . . representative of at least one characteristic of the cosmetic product [applied to the external body portion],” as recited in independent claim 4. As mentioned above, Groh does not disclose a cosmetic product applied to the external body portion. Further, Groh does not disclose the recited “image of the scanned image data [being] representative of at least one characteristic of the cosmetic product,” as recited in claim 4. Thus, independent claim 4 and dependent claim 6 are patentable over Groh for this additional reason.

3. Groh does not disclose foundation makeup, as recited in claim 6

The Section 102(b) rejection of claim 6 also should be reversed because Groh fails to disclose “foundation makeup,” as recited in claim 6. Contrary to the Examiner’s inherency allegations in the Office Action at page 6, Groh does not necessarily disclose “foundation makeup.” For example, Groh fails to even mention the terms “foundation” or “makeup.” Consequently, claim 6 is allowable over Groh for these additional reasons.

4. Groh does not disclose comparing a displayed image to one or more images formed from image data stored in an image database, as recited in claim 37

The Section 102(b) rejection of claim 37 should be reversed because Groh does not disclose “comparing [a] displayed image to at least one image formed from image data stored in an image database,” as recited in claim 37. In the Office Action at page 6, the Examiner cites Groh at col. 3, lines 1-32 and alleges that “[an] image can be compared to at least one other image formed from image data stored in and retrievable from an image database” Contrary to the Examiner’s allegation, Groh lacks any disclosure of comparing a displayed image to one or more other images formed from image data stored in an image database. For example, no such comparing is described in Groh at col. 3, lines 1-32, and Groh does not refer to any capability of conducting such comparing. Rather than having any disclosure of a displayed image being compared to one or more other images formed from image data stored in an image database, Groh merely describes using an image analysis system that evaluates an image to generate data such as size, shape, and total number count of comedones

appearing in specimen images. Col. 5, lines 55-60. For at least these reasons, independent claim 37 is patentably distinguishable from Groh.

5. Groh does not disclose displaying an image formed from scanned image data and viewing the displayed image to analyze one or more characteristics of an external body portion and/or product(s), as recited in claim 46

The Section 102(b) rejection of independent claim 46 and dependent claim 47 should be reversed because Groh does not disclose “displaying an image formed from . . . scanned image data; and viewing the displayed image to analyze . . . at least one characteristic [of an external body portion and/or at least one product],” as recited in claim 46. Rather than having any disclosure of such features, Groh describes examining a specimen under a microscope and evaluating the specimen using image analysis hardware and software to determine the number of comedones existing in the specimen. Abstract. Examining a specimen with a microscope and evaluating the specimen with image analysis hardware and software is not the same as, and does not result in “displaying an image formed from . . . scanned image data; and viewing the displayed image . . . ,” as recited in independent claim 46. Therefore, independent claim 46 and claim 47, which depends therefrom, are patentably distinguishable from Groh.

6. **Groh does not disclose placing a transfer member in contact with an external body portion including a cosmetic applied thereto, and image data for an image representative of at least one characteristic of the cosmetic product, as recited in claim 47**

Similar to claim 4, claim 47 recites that a “transfer member is placed in contact with an external body portion including a cosmetic product applied thereto, and [that] the scanned image data is representative of at least one characteristic of the cosmetic product.” Consequently, the Section 102(b) rejection of claim 47 also should be reversed for all of the reasons discussed above in Sections VII.C.1 and VII.C.2. with respect to claim 4.

7. **Groh does not disclose an image scanner configured in the form of a scanner for scanning documents, as recited in claim 48**

The Section 102(b) rejection of independent claim 48 and dependent claims 61 and 62 should be reversed because Groh does not disclose an “image scanner . . . configured in the form of a scanner for scanning documents,” as recited in claim 48. One of ordinary skill in the art would understand that Groh’s general description of a digital image analysis apparatus does not disclose a scanner having a document scanning configuration.

Contrary to the Examiner’s allegation in the final Office Action issued October 13, 2006, at page 2, nothing supports “an image . . . be[ing] interpreted as a document.” Furthermore, such an unsupported and strained interpretation of the term “image” fails to provide any meaningful explanation of why claim 48 has been rejected.

For at least these reasons, independent claim 48 and claims 61 and 62, which depend therefrom, should be allowable over Groh.

8. **Groh does not disclose analysis equipment chosen from one of a corneometer, a dermal torque meter, a PH meter, and a device for measuring hydration of the skin, as recited in claim 59**

The Section 102(b) rejection of claim 59 should be reversed because Groh does not disclose analysis equipment “chosen from one of a corneometer, a dermal torque meter, a PH meter, and a device for measuring hydration of the skin,” as recited in claim 59. Rather than providing any meaningful explanation of why claim 59 was rejected, the Examiner merely alleges in the final Office Action issued October 13, 2006, at page 2, that “Applicant’s specification as originally filed asserts each recited analysis equipment is equivalent as there is no criticality recited between elements.” Appellants respectfully disagree. To the extent the Examiner’s allegation is understood, it appears to reflect that the Examiner is improperly using the disclosure of the present application as a reference to reject the claim. For at least this reason, independent claim 59 is patentably distinguishable from Groh.

- D. **Rejection of claims 4, 7, 8, and 11 under 35 U.S.C. § 102(e) based on Stess should be reversed because Stess fails to disclose all of the features recited in the claims**

1. **Stess does not disclose a transfer member placed in direct contact with an external body portion including a cosmetic product applied thereto, as recited in independent claim 4**

The Section 102(e) rejection of independent claim 4 and dependent claims 7 and 8 should be reversed because Stess does not disclose a transfer member “placed in direct contact with an external body portion including a cosmetic product applied thereto,” as recited in independent claim 4. Appellants do not understand the basis for the Section 102(e) rejection of claim 4. On page 7 of the Office Action, the Examiner

cites reference numerals “25/27” as allegedly corresponding to a transfer member, and the Examiner acknowledges at page 8 that “the [purported] transfer member is not placed into direct contact with the skin” Assuming the Examiner has equated skin with the external portion recited in claim 4, the Examiner’s statement appears to acknowledge that Stess does not disclose placing a transfer member in direct contact with skin or any other external body portion.

On page 2 of the final Office Action issued October 13, 2006, the Examiner alleges that the recitation of “direct” in claim 4 purportedly “does not read over the prior art as the transfer member is fully capable of being placed in direct contact with the product applied to the external body portion” Further, in the final Office Action at page 7, the Examiner alleges that Stess purportedly discloses a transfer member placed in contact with an external body portion “that is inherently capable of including a cosmetic product applied thereto”

Appellants respectfully submit that the Examiner has not set forth a legally proper basis for these allegations of alleged capability and inherency. Speculation about the purported, possible capability of subject matter in a reference does not provide any evidence of inherent disclosure or any other basis for rejecting claims in an anticipation rejection. See M.P.E.P. § 2112(IV).

For at least these reasons, claims 4, 7, and 8 are patentable over Stess.

2. Stess does not disclose scanning with an optical image scanner to obtain scanned image data for an image, as recited in independent claim 4

The Section 102(e) rejection of claims 4, 7, and 8 also should be reversed because Stess does not disclose “scanning . . . with an optical image scanner to obtain

scanned image data for an image,” as recited in claim 4. Based on the Examiner’s comments, the Examiner seems to be equating Stess’s general disclosure of a digital scanner 51 with an “optical image scanner.” Stess merely discloses using a digital scanner to obtain “digital data” relating to the dimensions of an impression shirt. Col. 6, lines 10-31. There is nothing in Stess providing any express or inherent teaching of the recited “scanning . . . with an optical image scanner to obtain scanned image data for an image.” Stess never mentions or suggests an “optical image” or “scanned image data for an image.” Indeed, Stess’s digital scanner is not described as being an “optical image scanner.” Furthermore, there are many digital scanners that are not optical image scanners (i.e., some scanners use technology without any optical imaging). Moreover, since the purpose of Stess’s disclosed digital scanner 51 relates to proper dimensioning of an orthosis, one of ordinary skill in the art would understand that Stess’s scanner 51 would merely obtain dimensions of the impression shirt rather than obtaining any “image data” for an “image.” For at least these reasons, the rejection of claims 4, 7, and 8 should be reversed.

3. Stess does not disclose foundation makeup, as recited in claim 6, from which claims 7 and 8 depend

The rejection of claims 7 and 8 should also be reversed because Stess does not disclose “foundation makeup,” as recited in claim 6, from which claims 7 and 8 depend.

4. Stess does not disclose placing moldable material of a transfer member in direct contact with the skin of an individual to produce, on the moldable material, the surface profile of the skin, as recited claim 11

The Section 102(e) rejection of claim 11 should be reversed because Stess does not disclose placing “moldable material [of a transfer member] in direct contact with the skin of [an] individual to produce, on the moldable material, the surface profile of the skin,” as recited in independent claim 11. Stess mentions a resin-impregnated, thin, elastic fabric impression shirt 27 (col. 4, lines 12-13), but the impression shirt 27 is not disclosed as being placed in direct contact with skin of an individual. In fact, Stess describes in detail the necessity of a thermal insulation layer and how to prevent direct contact with the impression shirt material. See, e.g., col. 3, lines 29-40, 58-67; col. 4, lines 54-67. Thus, not only does Stess fail to teach placing moldable material in direct contact with skin, as recited in claim 11, but Stess also teaches away from any such contact. Moreover, Stess does not disclose producing, on moldable material, the surface profile of skin, as recited in claim 11.

For at least these reasons the Section 102(e) rejection of claim 11 should be reversed.

5. Stess does not disclose scanning with an optical image scanner to obtain scanned image data for an image, as recited claim 11

Similar to claim 4, claim 11 recites “scanning . . . with an optical image scanner to obtain scanned image data for an image.” As discussed above at Section VII.D.2. in connection with claim 4, Stess does not disclose such scanning with an optical image

scanner to obtain scanned image data for an image. Thus, the Section 102(e) rejection of claim 11 should be reversed.

E. The Section 103(a) rejection of claims 25-36 and 38-45 should be reversed because the Examiner has failed to set forth a *prima facie* case of obviousness

- 1. Neither Groh nor Kvedar, nor any combination thereof, discloses or renders obvious scanning with an optical image scanner to obtain scanned image data for an image, as recited independent claims 25 and 38**

The Section 103(a) rejection of claims 25-36 and 38-45 should be reversed because neither Groh nor Kvedar, nor any combination thereof, discloses or renders obvious an “image scanner . . . configured in the form of a scanner for scanning documents,” as recited in each of independent claims 25 and 38. For at least this reason, the Examiner has failed to establish a *prima facie* case of obviousness.

According to the M.P.E.P., in order to establish a *prima facie* case of obviousness, the record must “include[] findings of fact concerning the state of the art and the teachings of the references” § 2141(II) (relying on KSR Int’l Co. v. Teleflex Inc., 127 S. Ct. 1727, 82 U.S.P.Q.2d (BNA) 1385 (2007), and confirming the legal framework established by Graham v. John Deere Co., 383 U.S. 1, 17, 148 U.S.P.Q. (BNA) 459, 467 (1966)). Moreover, “[o]nce the findings of fact are articulated, [the examiner] must provide an explanation to support an obviousness rejection under 35 U.S.C. [§] 103.” Id. If it is found that the prior art references fail to disclose all of the subject matter recited in a claim, the rejection statement “must explain why the difference(s) between the prior art and the claimed invention would have been obvious to one of ordinary skill in the art.” § 2141(III).

At least because the Office Action is completely devoid of the analysis and explanation required to support a proper claim rejection under § 103(a), Appellant respectfully submits that the Examiner has failed to establish a *prima facie* case obviousness with respect to independent claims 25 and 38.

The Examiner fails to provide any rationale in purported support of the implied allegation that Groh and/or Kvedar somehow disclose or render obvious the above-identified subject matter recited in independent claims 25 and 38. Indeed, Groh does not disclose an “image scanner . . . configured in the form of a scanner for scanning documents” being used to scan a transfer member. Kvedar also lacks any disclosure of subject matter remedying that deficiency, and the Examiner has not made any allegation to the contrary.

Appellants respectfully submit that the rejection statement has (1) failed to make proper findings of fact with respect to independent claims 25 and 38 and the prior art, and (2) has failed to articulate any rationale in purported support concerning why the differences between the hypothetical combination of Groh and Kvedar and the above-identified subject matter recited in independent claims 25 and 38 would have been obvious to a person having ordinary skill in the art.

As noted above, the Examiner has failed to provide any rationale in purported support of its implicit allegation that an “image scanner . . . configured in the form of a scanner for scanning documents,” as recited in independent claims 25 and 38, would have been obvious in view of Groh and Kvedar. In fact, the Examiner does not mention this subject matter. Thus, the Examiner has failed to make the required findings of fact with respect to independent claims 25 and 38.

In addition to the above-noted deficiencies, the Examiner has also failed to articulate any rationale in purported support relating to why the differences between the collective teachings of Groh and Kvedar and the subject matter recited in independent claims 25 and 38 would have been obvious to one of ordinary skill in the art. Indeed, the Examiner fails to mention that those references fail to disclose an “image scanner . . . configured in the form of a scanner for scanning documents,” as recited in independent claims 25 and 38.

For at least the above-outlined reasons, the Examiner has failed to establish a *prima facie* case of obviousness with respect to independent claims 25 and 38. Thus, Appellants respectfully submit that independent claims 25 and 38 are patentably distinguishable from Groh and Kvedar, regardless of whether those references are viewed individually or as a whole. Dependent claims 26-36 and 39-45 depend from independent claims 25 and 38, respectively, and thus, dependent claims 26-36 and 39-45 should also be patentably distinguishable from those references for the same reasons as independent claims 25 and 38. Therefore, Appellants respectfully request reversal of the improper rejection of claims 25-36 and 38-45 under § 103(a) based on Groh in combination with Kvedar.

F. Conclusion

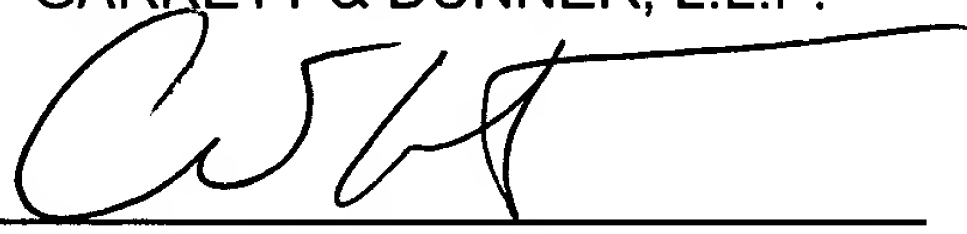
For at least the reasons given above, pending claims 4-20, 24-48, 59, 61, and 62 are in compliance with 35 U.S.C. § 112, first and second paragraphs, and are patentably distinguishable from Groh, Stess, and Kvedar, regardless of whether those references are viewed individually or as a whole. The Board is therefore respectfully requested to reverse all of the claim rejections under 35 U.S.C. §§ 112, first and second

paragraphs, 102(b), 102(e), and 103(a), so that all of pending claims 4-20, 24-48, 59, 61, and 62 may be allowed.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this Appeal Brief, such extension is hereby respectfully requested. If there are any fees due which are not enclosed herewith, please charge such fees to our Deposit Account 06-0916.

Respectfully submitted,
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: March 14, 2008

By: 
Christopher T. Kent
Reg. No. 48,216

Finnegan, Henderson, Farabow,
Garrett & Dunner, L.L.P.
Customer No. 22,852

VIII. Claims Appendix

4. A process for acquiring scanned image data relating to an external body portion and/or a product applied to the external body portion, the process comprising:

placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member,

wherein the transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another,

wherein the transfer image is not a fingerprint or fingerprints, and

wherein the external portion that the transfer member is placed in contact with does not include a tooth or teeth; and

scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of

the external body portion, and/or

at least one product applied to the external body portion,

wherein the transfer member is placed in direct contact with an external body portion including a cosmetic product applied thereto, and wherein the image of the scanned image data is representative of at least one characteristic of the cosmetic product.

6. The process of claim 4, wherein the external portion includes skin and wherein the cosmetic product is foundation makeup.

7. The process of claim 6, wherein the transfer member is formed of fabric.

8. The process of claim 7, wherein the transfer member is an article of clothing.

11. A process for acquiring scanned image data relating to an external body portion and/or a product applied to the external body portion, the process comprising:

placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member,

wherein the transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another,

wherein the transfer image is not a fingerprint or fingerprints, and

wherein the external portion that the transfer member is placed in contact with does not include a tooth or teeth; and

scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of

the external body portion, and/or

at least one product applied to the external body portion,

wherein the transfer member is a moldable material, and wherein the process includes placing the moldable material in direct contact with the skin of the individual to produce, on the moldable material, the surface profile of the skin.

25. A process for acquiring scanned image data relating to an external body portion and/or a product applied to the external body portion, the process comprising:

placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member,

wherein the transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another,

wherein the transfer image is not a fingerprint or fingerprints, and

wherein the external portion that the transfer member is placed in contact with does not include a tooth or teeth; and

scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of

the external body portion, and/or

at least one product applied to the external body portion,

wherein the image scanner is associated with a first computer located at a first location, and wherein the process further comprises transferring the scanned image data from the first computer to a second computer located at a second location remote from the first location, and

wherein the image scanner is configured in the form of a scanner for scanning documents.

26. The process of claim 25, wherein the transferring includes transmitting the scanned image data via the Internet.

27. The process of claim 25, further comprising storing the scanned image data on a data storage medium, wherein the transferring includes shipping the data storage medium to the second location.

28. The process of claim 25, further comprising transferring questionnaire answers from the first location to the second location, at least some of the questionnaire answers being related to at least one of a condition of the external portion and the product applied to the external body portion.

29. The process of claim 25, further comprising sending to the second location at least one of billing information and payment information.

30. A process of analyzing at least one characteristic of an external body portion of an individual and/or at least one product applied to the external body portion, the process comprising:

acquiring scanned image data according to the process of claim 25;
displaying an image corresponding to the scanned image data; and
viewing the displayed image to analyze said at least one characteristic.

31. The process of claim 30, wherein the image is displayed at the second location.

32. The process of claim 30, further comprising sending the scanned image data to a plurality of locations so that the at least one characteristic may be analyzed numerous times.

33. The process of claim 30, further comprising monitoring status of the external portion during treatment of the external portion.

34. The process of claim 33, further comprising providing a recommendation for a treatment of the external portion based on the monitored status.

35. The process of claim 33, further comprising providing the individual with information regarding the effectiveness of the treatment.

36. The process of claim 33, wherein the monitoring includes repeating at least the acquiring.

37. A process of analyzing at least one characteristic of an external body portion of an individual and/or at least one product applied to the external body portion, the process comprising:

acquiring scanned image data, wherein the acquiring comprises

placing a transfer member in contact with an external portion of an

individual so as to obtain a transfer image on the transfer member,

wherein the transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another,
wherein the transfer image is not a fingerprint or fingerprints, and
wherein the external portion that the transfer member is placed in contact with does not include a tooth or teeth, and
scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of the external body portion, and/or
at least one product applied to the external body portion;
displaying an image corresponding to the scanned image data;
viewing the displayed image to analyze said at least one characteristic; and
comparing the displayed image to at least one image formed from image data stored in an image database.

38. A process for recommending treatment for an external body portion, the process comprising:
analyzing at least one characteristic of an external body portion wherein the analyzing comprises
acquiring scanned image data, wherein the acquiring comprises
placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member,

wherein the transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another,

wherein the transfer image is not a fingerprint or fingerprints, and

wherein the external portion that the transfer member is placed in contact with does not include a tooth or teeth;

scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of

the external body portion, and/or

at least one product applied to the external body

portion;

displaying an image corresponding to the scanned image data; and

viewing the displayed image to analyze said at least one characteristic;

determining a recommendation of at least one treatment for the external portion;

and

providing the treatment recommendation so that the external portion of the individual may be treated according to the recommendation,

wherein the image scanner is configured in the form of a scanner for scanning documents.

39. The process of claim 38, wherein the treatment recommendation is a recommendation regarding use of at least one of a cosmetic product and a dermatological product.

40. The process of claim 39, wherein said at least one of the cosmetic product and the dermatological product is one of a makeup product, a care product, a hair product, a skin product, and a sun exposure product.

41. The process of claim 39, wherein the treatment recommendation is a recommendation regarding application of said at least one of the cosmetic product and the dermatological product to the external portion.

42. The process of claim 38, further comprising providing product ordering information along with the treatment recommendation.

43. The process of claim 38, wherein the providing of the treatment recommendation includes providing the treatment recommendation to at least one of the individual and a treatment provider.

44. The process of claim 43, wherein the providing of the treatment recommendation includes transmitting said recommendation to said at least one of the individual and the treatment provider via the Internet.

45. The process of claim 38, wherein a computer at least partially performs the determining of the treatment recommendation, the computer being located at a location remote from that of the image scanner.

46. A process of evaluating a product applied to an external body portion, the process comprising:

analyzing at least one characteristic of a product applied to an external body portion wherein the analyzing comprises

acquiring scanned image data, wherein the acquiring comprises

placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member,

wherein the transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another,

wherein the transfer image is not a fingerprint or fingerprints, and

wherein the external portion that the transfer member is placed in contact with does not include a tooth or teeth, and

scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of

the external body portion, and/or

at least one product applied to the external body portion;

displaying an image formed from the scanned image data; and

viewing the displayed image to analyze said at least one characteristic.

47. The process of claim 46, wherein the transfer member is placed in contact with an external body portion including a cosmetic product applied thereto, and wherein the scanned image data is representative of at least one characteristic of the cosmetic product.

48. A process for acquiring scanned image data relating to an external body portion and/or a product applied to the external body portion, the process comprising:

placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member,

wherein the transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another,

wherein the transfer image is not a fingerprint or fingerprints, and

wherein the external portion that the transfer member is placed in contact with does not include a tooth or teeth;

scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of

the external body portion, and/or

at least one product applied to the external body portion; and

collecting information relating to the transfer image of the transfer member to form a database for use in at least one of diagnoses, treatment recommendation determinations, product evaluations, and product formulations,

wherein the image scanner is configured in the form of a scanner for scanning documents.

59. A process for acquiring scanned image data relating to an external body portion and/or a product applied to the external body portion, the process comprising:

placing a transfer member in contact with an external portion of an individual so as to obtain a transfer image on the transfer member,

wherein the transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another,

wherein the transfer image is not a fingerprint or fingerprints, and

wherein the external portion that the transfer member is placed in contact with does not include a tooth or teeth;

scanning the transfer image with an optical image scanner to obtain scanned image data for an image representative of at least one characteristic of

the external body portion, and/or

at least one product applied to the external body portion; and

analyzing at least one of the external body portion and the transfer member with analysis equipment,

wherein the analysis equipment is chosen from one of a corneometer, a dermal torque meter, a PH meter, and a device for measuring hydration of the skin.

61. The process of claim 48, further comprising providing a grade indicative of at least one of the condition of the external portion and performance of the product.

62. The process of claim 61, further comprising storing information relating to the grade in a database.

IX. Evidence Appendix

None

X. Related Proceedings Appendix

In U.S. Application No. 09/725,049 (attorney docket No. 05725.0784-00000), which is now abandoned, an Appeal Brief was filed on August 15, 2005, and the Examiner subsequently re-opened prosecution prior to any decision by the Board. The Appeal Brief filed in U.S. Application No. 09/725,049 may be related to, directly affect, be directly affected by, or have a bearing on the Board's decision in the pending appeal, and a copy of that Appeal Brief has been submitted herewith.